

## **IDS Working Paper 260**

### **Unpacking rights and wrongs: do human rights make a difference?**

#### **The case of water rights in India and South Africa**

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## Summary

This paper focuses on why poor and marginalised people still lack access to economic, social and cultural rights (also known as positive rights), despite a fairly mainstream support to positive rights in mainstream development debates. In part this is due to the problematic division between so-called first and second generation of rights. This is particularly true in the water debate where dominant narratives more often see water as an economic good rather than as a human right.

Rights also fail to be realised due to *sins of omission* where poor states may lack the institutional capacity or financial resources to provide rights. Similarly, citizens may not be aware of rights and may not have the capacity to mobilise around them. Lack of rights may also be due to *sins of commission*. Thus states or non-state actors such as the World Bank may knowingly put vulnerable people's rights at risk or even violate them with impunity. Economic globalisation also leads to policies that violate basic rights where diffuse and unclear rules of accountability exist for global and local players.

The paper focuses on the right to water in South Africa to examine sins of omission and looks at forced displacement caused by the Narmada dams in India to examine sins of commission. In both cases, it examines local-level dynamics of rights grievances and claims and argues that there is a blurriness between policy and practice around rights practice and violation and that there are often overlaps between sins of omission and commission. Finally, the paper highlights the need for accountability structures and mechanisms through which compliance and answerability can become an indispensable aspect of the human rights regime.

Keywords: human rights; economic, social and cultural rights; citizenship; accountability; right to water; forced displacement; Narmada Project; India and South Africa.



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# 1 Introduction

In the past decade, the rights discourse has gained currency in international development. A human rights approach to development is seen as moving away from looking at charity or handouts to empowerment and to securing firm rights to ‘the requirements, freedoms and choices necessary for life and development in dignity’ (Hausermann 1998). Still, even though support for the human rights movement has been growing considerably and a human rights approach to development is now fairly mainstream (ibid; ICHRP 2004), there is a growing acknowledgement that many of the world’s poor and marginalised are still to enjoy the benefits of these rights, in particular economic, social, and cultural rights. Over the past century, citizenship has increasingly been seen as encompassing social and economic rights often known as positive rights. Advocacy for positive rights – such as access to water, food, and shelter – marks a sharp change from the negative or liberal understanding of rights that underpins notions of liberal democracy. Neoliberal thought has traditionally viewed negative civil and political rights as essential to understanding what, for example, constitutes citizenship. Yet these traditions have been reluctant to award the same widespread attention to social and economic rights, because such rights have strong links to social justice and imply moving away from the neoliberal notion that people’s socio-economic status is determined by the market (Plant 1998: 57–8).

Two other reasons may also be at work which I highlight in this paper. One, due to *sins of omission*<sup>1</sup> citizens may be denied access to social and economic rights. It is well known that poor states may not prioritise the imperative to provide education, water and housing for all. Also many developing countries may lack the resources to provide rights to all citizens to a live a life in dignity or else may lack the institutional capacity to provide these rights. Similarly, citizens may not be aware of rights and may not have the capacity to mobilise around them. Two, lack of rights may be due to *sins of commission*. Thus states or non-state actors such as the World Bank may knowingly put vulnerable people’s rights at risk or even violate them for a variety of reasons. For example, the freedom of speech and right to protest are severely restricted in times of dictatorships. Rights may also be violated in the name of ‘development’. As this paper demonstrates, dam-building causes forced displacement which infringes on displaced people’s rights to livelihood, land, water, and so on. Moreover, macroeconomic policies in the name of development or growth can be introduced by states and global players that violate basic rights. In both cases, it is important to examine local-level dynamics of rights grievances and claims and why access to rights is hindered. It is also key to examine whether institutional mechanisms and accountable structures are in place to address the needs of people denied access to rights due to sins of omission or whether there are institutional channels for seeking justice and redress for rights at risk when rights are denied due to sins of commission.

Accountability is usually seen as the means through which the less powerful can hold the more powerful to account (Goetz and Jenkins 2004). Traditionally, it is governments that are responsible for protecting and governing people’s rights and lives, but there is an increasing need to hold private sector

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<sup>1</sup> This distinction is not new. This paper, however, seeks to tease out the conceptual and practical implications.

and global actors to account whose policies and programmes have a far-reaching impact on the rights and wellbeing of poor and vulnerable people. Diffuse and unclear rules of accountability to global players and non-state players are problematic when most human rights declarations largely focus on states as the primary duty-bearers to both deliver and protect rights. However, economic globalisation often makes the state both an adversary and an ally of marginalised people; a protector and violator of their basic rights. In many cases, states and other actors violate basic rights with impunity and the mechanisms to hold them to account are few and far between.

This paper demonstrates that accountability is still often a missing factor in the human rights debates, arising due to sins of commission and omission with respect to realising rights. For the Millennium Development Goals and other processes to be successful, attention must be paid to several on-the-ground contradictions and questions: Are there possible paradoxical outcomes arising out of dual commitments to both markets and rights which can compromise people's basic rights as well as make it difficult to enforce accountability mechanisms? Can poor institutional capacity and low resource allocation impede the realisation of economic and social rights? Do the necessary accountability mechanisms exist to hold the powerful to account? Is there an ambiguity about responsibilities and duty-bearers when economic and social rights are violated?

The paper addresses these questions and dilemmas with the help of two cases. The first case examines questions around the right to water.<sup>2</sup> In 2002, the UN Economic, Social and Cultural Council gave a lot of prominence to the right to water through its General Comment No. 15, which is an authoritative interpretation of the 'International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), ratified by 148 states. The Comment, a non-legally binding document, stated explicitly that the right to water is a human right and that responsibility for the provision of sufficient, safe, affordable water to everyone, without discrimination, rests with the state. Still the right to water is very controversial on many fronts. While in principle it is accepted that there is an 'indivisibility' of civil and political rights on the one hand, and economic, cultural and social rights on the other, in practice there is still no equal recognition and there is the assumption that economic and social rights can only be realised once the so-called first generation of rights are realised. Furthermore, in the water debate, dominant narratives more often see water as an economic good rather than as a human right. South Africa, however, stands out in this regard and is the only country with a constitutional right to water. Thus, case one examines how sins of omission largely prevent many vulnerable groups from having access to the right to water in South Africa where the lack of financial resources, poor institutional capacity and very little knowledge of rights

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<sup>2</sup> The Centre on Housing Rights and Evictions (COHRE) in Geneva, which has done extensive research on the right to water, clearly lays down the legal basis for the right to water (COHRE 2004). At the 1977 United Nations World Water Conference, the Mar del Plata Declaration recognised that all peoples have the right to have access to drinking water in quantities and of a quality equal to their basic needs. It has subsequently been recognised explicitly in several legally binding treaties, e.g. the Convention on the Elimination of all Forms of Discrimination Against Women, 1979 (CEDAW); the Convention on the Rights of the Child, 1989 and more recently in the General Comment 15.



prevent them from being realised and claimed by citizens. Still, even here, sins of commission take place since one could argue that processes such as privatisation and cost recovery put basic rights at risk.

The India case more obviously examines sins of commission where displaced people's rights are both put at risk or blatantly violated through processes of forced displacement. It focuses on how either states or agencies such as the World Bank knowingly put rights at risk due to forced displacement in the name of 'development'. Even though policies and safeguards are in place to ostensibly mitigate the risks of forced displacement, the history of dam building has led to a string of human rights violations. These issues are examined by looking at the case of the Narmada dams in India and by asking how and whether agencies such as the Indian government and the World Bank can be held accountable.

Both cases are the result of primary fieldwork conducted by the author. Fieldwork for the South African case took place in 2002 and 2003. Research in India's Narmada Valley has been ongoing since 1991. Both cases, though different, highlight serious accountability gaps, contradictions in assigning responsibilities for both rights realisation and rights violations and inadequate resource allocations and institutional capacity to implement rights. They also highlight serious limitations in the political will to take rights seriously and power differentials that allow some actors to continue to violate rights with impunity. The paper discussed the two cases and then concludes with some reflections on accountability and rights.

## **2 Dancing to the two tunes of rights and markets? Implementing South Africa's right to water**

As mentioned, South Africa is the only country that recognises the human right to water at both the constitutional and policy level. Moreover, its Free Basic Water (FBW) policy goes against the grain of conventional wisdom in the water sector which stresses cost recovery mechanisms and shies away from endorsing the human right to water (Mehta 2004). Since early 2000, the Department for Water Affairs and Forestry has been investigating providing a basic level of water free to all citizens. In February 2001, the government announced that it was going to provide a basic supply of 6,000 litres of safe water per month to all households free of charge (based on an average household size of eight people).<sup>3</sup> The Water Services Act 108 of 1997 states that a basic level of water should be provided to those who cannot pay, and the FBW policy emanates from the legal provisions of the Act. The main source of funding for this initiative is the 'Equitable Share', a grant from the central government to local authorities. It amounts to about R 7.5 billion a year and is from national taxes for the provision of basic services.<sup>4</sup>

While the government of South Africa stands alone internationally in endorsing the constitutional right to water, its policies have been informed by several dominant framings in water management which include an emphasis on cost recovery, as well as a shift from the state being a direct provider of water-related goods and services to performing a more regulatory function where privatisation is seen as the

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<sup>3</sup> This is based on the WHO recommendation for water supply sufficient to promote healthy living set at 25 litres of safe, clean water per person per day within 200 meters of homes.

<sup>4</sup> DWAF official, personal communication by email, 16 May 2005.

means to overcome the past failure of public systems to provide water to the poor. Its policies draw on a quasi consensus amongst multilateral and bilateral agencies around issues such as cost recovery, user fees, and demand management, which have manifested themselves in both poor and middle income countries like South Africa (Mehta 2004). For example, several authors have demonstrated the extent to which the World Bank and the International Finance Corporation (IFC) have influenced South African government thinking, away from its Reconstruction and Development Programme (RDP) commitments in infrastructure and service provision based on entitlement and welfare, towards a cost recovery approach which can deprive poor communities of their basic rights to an adequate provision of water (Pauw 2003; Bond 2001; 2002). In 1996, total cost recovery became an official policy of the government when it adopted its fiscally conservative 'Growth, Employment and Redistribution' macroeconomic policy, known as GEAR. The central features of the policy are a reduced role for the state, fiscal restraint and the promotion of privatisation.

Thus, alongside the remarkable commitments to providing free water, several World Bank influenced policy changes were introduced (Pauw 2003; Bond 2001). These include the 'credible threat of cutting service' to non-paying consumers, a move which has been linked by some to cholera and other gastrointestinal outbreaks (Pauw 2003; McDonald 2002). From 1997, municipalities began to witness widespread cut-offs of basic services to non-payers (*ibid.*). Due to the cost-recovery principle, households that used more than the basic amount found themselves unable to pay and faced disconnections. In the case of *Manquele v Durban Transitional Metropolitan Council* 2001 JOL 8956 (D), the High Court found that the City Council had a right to disconnect the water supply of the applicant, Mrs Manquele, because she chose not to limit herself to the water supply provided to her free of charge. However, commentators argue that by completely disconnecting her water supply, Mrs Manquele was deprived even of the free basic amount which was problematic since the right to a basic level of water supply exists notwithstanding the ability to pay (Community Law Centre 2002). While cut-offs took place even during apartheid times (when non-payment for services was a form of political resistance) (Barry Jackson, personal communication, 23 December 2003), the indignation is undoubtedly higher today, not least because of the strong importance awarded to social and economic rights in South Africa's constitutions.

There are controversies around the number of people who have experienced cut-offs. According to the Municipal Services project, using representative national survey data from the Human Sciences Research Council (HSRC), 10 million people have experienced cut-offs in recent years (McDonald 2002). This figure however is contested and has been refuted by the Department for Water Affairs and Forestry (DWAF) (Kasrils 2003) and further revised by the HSRC to approximately 2 per cent of all connected households, equating to over 250,000 people. Despite DWAF admitting such numbers to be a matter of serious concern, McDonald stands by the figure of 10 million and has challenged DWAF and other agencies to research a more accurate figure (*Sunday Independent* 2003).

As part of GEAR, the South African government also decreased grants and subsidies to local municipalities and city councils. This forced cash-strapped local authorities to turn towards privatisation as well as to enter into partnerships in order to generate the revenue no longer provided by the national state

(McKinley 2003). Since local government structures were incapable of dealing with past backlogs on their own, they began to privatise public water utilities by entering into service and management ‘partnerships’ with external agencies. These ranged from multinational water corporations to South African firms. Another form of outsourcing has been through the deployment of the services of parastatal water boards that make profits but usually plough them back into infrastructure development (e.g. Rand water). The role of consortia was also key. For example, Suez, which collaborated with the apartheid government in providing water largely to the white minority, formed Water and Sanitation Services Africa (WSSA). It subsequently won ‘delegated management’ contracts in Queenstown, Fort Beaufort and Stutterheim (all in the Eastern Cape) (Bond *et al.* 2001). Ruiters (in Pauw 2003), who researched water privatisation in these three towns, argues that water tariffs increased up to 300 per cent between 1994 and 1999. Pauw (2003) argues that by 1996, a typical township household was paying up to 30 per cent of its income for water, sewerage and electricity. Average income in the area at the time was less than US\$60 per month, with more than 50 per cent unemployed. Those who could not pay their bills (the majority) were cut off and in Queenstown special debt collectors were appointed and a re-instatement fee was introduced that was almost twice the average township income.

### **2.1 Implementing FBW: experiences from the Eastern Cape**

The Eastern Cape is the poorest of South Africa’s nine provinces, with a predominantly rural population, high unemployment, and poor access to social services. Located on the south-eastern coast, the Eastern Cape province accounts for approximately 16 per cent of South Africa’s population. Of all equitable share allocations to the nine provinces the Eastern Cape receives between 17–18 per cent (National Treasury 1999; 2004). Research was conducted in two district municipalities in the former Transkei.<sup>5</sup> The Alfred Nzo District Municipality (ANDM) is one of the poorest district municipalities in the Eastern Cape. It has 50 per cent unemployment and has no manufacturing industry to curb the problem.<sup>6</sup> It is also characterised by a huge backlog of services such as roads, water services, health facilities, and electricity. It is primarily a large poor rural population that comprises the municipality. 214 villages at ANDM have a reliable water supply whilst more than 400 villages do not have any water scheme whatsoever. ANDM is one of the poorest district municipalities in the Eastern Cape. OR Tambo is a slightly larger municipality with a population of over 1.6 million and an unemployment rate of 51.8 per cent. Currently available statistics indicate that only 13.2 per cent have acceptable access to safe water (SSA 2002).

The FBW policy was conceived by DWAF at the national level but its implementation rests with local authorities who are designated water services authorities that include both district and local municipalities (the latter, however, have to apply to be water services authorities). They are free to interpret it according to the resources and capacity available. However, operationalising the policy has been difficult. After all, the mere endorsement of the principle of social justice alone cannot suffice in

<sup>5</sup> See Mehta and Ntshona (2004) for more details.

<sup>6</sup> Interview with the Deputy Director, Water and Sanitation, Alfred Nzo District Municipality, 10 December 2002.

determining how resources are to be distributed. Instead, as Hayek argues, the distribution of resources and implementing rights-based approaches are usually at the discretion of professionals and bureaucrats in the public sector, who lack a clear directive on how to 'implement justice' (Hayek in Plant 1992: 20). This certainly echoes the experiences of officials in South Africa's Eastern Cape. Many worked in bureaucracies of the former homelands and inherited a massive backlog in 1994. They also struggle to grapple with the many political and institutional changes arising through South Africa's decentralisation process.<sup>7</sup>

Many of the poorer District Municipalities lack financial and institutional resources to implement the policy, despite Equitable Share grants. Moreover, monitoring and rationing the quota of free water is also very difficult. Often, it can cost more to install a water meter than to actually provide the water for free<sup>8</sup>. In some cases, the FBW policy has also made charging for water difficult. Many communities understood that they would now have to stop paying for water (Jackson 2002). Therefore, for cash-strapped district municipalities, raising the money to provide water is now becoming increasingly difficult.<sup>9</sup>

How do poor municipalities such as ANDM deal with this? The ANDM has realised that it is costly to charge for water in rural areas. They have been down that road in the past and they feel it was too taxing and an administrative burden to try to collect tariffs. The ANDM discovered that it costs more to collect tariffs than the tariffs collected. Therefore they are now moving to implement FBW. Moreover, many of the schemes were under-utilised, for example Build-Operate-Train-Transfer (BOT'T) schemes which relied on expensive technology and outside experts rather than local knowledge and expertise. In one of the pre-paid schemes, it was discovered that only half the population was using the scheme since they could not afford to pay for the pre-paid cards and the rest continued to use the usual sources of water. Those using the scheme were collecting on average three litres per person per day, which means that the investment could not yield the benefits intended and millions of Rand were under-utilised. Moreover, the scheme was not addressing the problems of health and freeing women from collecting water from afar. It is for this reason that ANDM moved away from the policy of cost recovery and the FBW policy is implemented in all the schemes which they have taken over, including the expensive BOTT schemes. However ANDM has not announced the policy to the entire district municipality lest they run into serious financial problems in implementing it. Thus, many people in the Eastern Cape, especially in the remote rural areas, are not even aware of the policy of FBW.

## **2.2 Free water or basic water?**

It has been argued that FBW is difficult to realise in rural areas which encounter a massive backlog with respect to water supply and sanitation. Take ANDM, in 2003 132 villages (with a population of about

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<sup>7</sup> Budget cuts have gone hand in hand with decentralisation in South Africa (Manor 2001). The function of water services provision is now performed by the municipality itself or by other public or private bodies. While this process devolves power to local authorities and gives more voice to ordinary citizens, it can also lead to shedding of functions and the dumping of 'unfunded mandates' on lower levels of government, which poor rural municipalities are not able to implement (Olver 1998).

<sup>8</sup> Interview with DWAF official, Mount Ayliff, 23 April 2002.

<sup>9</sup> See also Kihato and Schmitz (2002).

170,000 people) were being serviced with basic schemes. By 2010 the district municipality plans to serve 420 villages (at a population of about 540,000 people) which still only add up to 63 per cent of the villages in the entire district.

Clearly some areas are lagging behind and in terms of water supply the ANDM has to consider both the free basic water policy as well as basic water for all. In principle basic water for all takes precedence in the work of ANDM together with consideration for sanitation priorities. However there is a trade off in implementing free water for some and basic water for all. The ANDM has contracted consultants to develop business plans for priority villages within the municipality. A village with a high population size, a clinic and/ or a school is generally high in the list of priorities. However, if a priority village is next to a village with low priority, the consultants have to develop a business plan that encompasses both villages as one project because people in the next village would fail to understand why they are being bypassed whilst the other village is earmarked to get a water scheme. Indeed, failure to recognise adjacent villages could result in pipes being destroyed and water thefts.

In order to ensure that basic water is provided, the ANDM has introduced play-pumps as interim measures in villages which are unlikely to receive water in the near future.<sup>10</sup> The play-pumps would also curb the problem of cholera which in the beginning of 2003 was a problem in other district municipalities. Play-pumps cost anything between R20,000 and R100,000 with a reservoir. Clearly despite all good intentions, district municipalities such as ANDM and OR Tando are finding it difficult to realise FBW for all. In part it is due to the backlog inherited in 1994 combined with both financial and institutional constraints. At the time of writing, 55.2 per cent of the country's poor population was being served by FBW (DWAF 2005). In 2003, two years after the policy had been announced only 50 per cent of the communities had implemented FBW (COSATU 2003)

### **2.3 Livelihood and poverty reduction impacts**

The FBW policy was not intended to address redistribution issues, and there are other provisions in the National Water Act (for example, compulsory licensing) that deal with these. Still, we need to ask how it contributes to poverty reduction and wider social justice concerns. For example, it is intended that the 25 litres of water will be used primarily for drinking and cooking purposes. However, the poor also need to be assured of water during scarcity periods for their farming activities based on subsistence. The 25 litres a day policy largely focuses on domestic water supply, and not on wider concerns of livelihood security and how to restructure existing water-user practices.

The Committee on Economic and Social rights does not lay down particular standards on how much water should be provided. It states that water supply must be sufficient for personal and domestic uses, as corresponding to WHO standards which constitute a minimum of 50–100 litres per day with an absolute minimum of 20 litres per day (COHRE 2004: 8). Thus South Africa is providing close to the absolute

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<sup>10</sup> Play-pumps are designed in such a way that anyone can operate them. Children, who can get on and off the wheel as they play, can turn around the horizontal wheel. The structure of the play-pump can also cater for small billboards, where adverts that are visible from a distance can be posted.

minimum.<sup>11</sup> This is why trade union leaders and other advocates in South Africa argue that the South African State should grant everybody at least 50 litres of water per day per capita. This, they argue, is the only way in which poor farmers can successfully maintain their livelihoods and thus escape the trap of poverty and dependence on pension grants.<sup>12</sup>

Do enforceable social and economic rights make a difference to people's lives and livelihoods? As demonstrated above, rights-based approaches may not necessarily radically redistribute resources in a society. But do they make a difference to poor people and what are local level village experiences of FBW? In Masakala village in the Eastern Cape, with the introduction of the FBW policy, poor people have gained access to water. Take the case of three rural women, two are pensioners and one is unemployed. Mabombo is 61 years old and is entitled to an old age pension. Before the implementation of the FBW policy, she used to collect water from the spring far from her house, and used a ten-litre container to make two or three trips to the spring before sunrise. Collection from the spring was difficult for her because she had to wait for the sediments to settle before collecting. She now feels that life has improved since the introduction of the FBW policy. She does not have to wake up in the morning before the livestock make the spring water murky and can concentrate her energy on other work. She uses the FBW for washing, drinking and cooking, though she still visits the spring to wash blankets. Mathungu, 70 years old, also supports a large family with her old age pension grant. She could not afford the R10 before the implementation of the FBW policy in order to pay for water services in her village. She too no longer needs to go to the spring on a daily basis for her water tasks. Masakala is an unemployed member of the water committee. Her main complaint with the FBW is the rules on how water should be consumed. She feels that when she paid R10 a month for water she used as much as she wanted but under the FBW policy, there are limits. Occasionally she needs to pay for additional water when she is hosting a cultural event in her house (see Mehta and Ntshona 2004 for more details).

Clearly, FBW has made a significant difference to the everyday lives of people like Mathungu, Masakala and Mabombo. For one, it frees women from the time taken to collect water and the health benefits are clear since they do not need to resort to unprotected streams. However, one could ask whether it is really addressing poverty reduction goals since the water cannot be used for agricultural production and livelihoods purposes. In Mdudwa village people are unhappy with the scheme because they feel it has not improved people's livelihoods and has also imposed restrictions on water use for activities which are important to them (such as washing blankets for funerals and other ceremonies). Moreover, there are also still many people in the Eastern Cape who are not aware of the FBW policy.

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<sup>11</sup> Of course what counts as 'sufficient water' is controversial. People can also survive on 10 litres a day (Mehta 2005).

<sup>12</sup> Lance Veotee, interview, 15 April 2002.

## **2.4 Implementing the right to water: some conclusions**

One, there has not been a standardised response to FBW with water service providers (who could be private companies, water boards, district municipalities, or community-based organisations) interpreting the policy in different ways. The result is that some South African citizens still do not enjoy FBW and many are not even aware of their constitutional right to 25 free litres of water per day. Thus there is very uneven access to the right to water in South Africa.

Two, while FBW has made a difference to the lives of poor people, the issue of poverty reduction seems to be lagging behind. The General Comment provides that States are required to ensure each person has access to sufficient, safe, acceptable, accessible and affordable water for personal and domestic use, and this is what the 25 litres per day per person achieves. But the Committee also states that while priority must be given to water for personal and domestic use, it is also important to recognise the need for water to meet the most essential aspects of each of the other relevant human rights (e.g. right to livelihood, food etc.) for which South Africa's provision of 25 litres does not suffice.

Three, the experiences of the Eastern Cape highlight the difficulties in implementing the principles of free basic water and cost recovery in tandem. With respect to affordability, the Committee states that water should be affordable and not reduce a person's capacity to buy other essential goods, such as food, housing etc. This normally means that water must be subsidised for poor communities and provided free where necessary. This is the spirit of the FBW policy. However, this analysis has demonstrated how cost recovery, and privatisation approaches also dominate South Africa's water domain. In the villages studied both willingness and ability to pay for water services were not very high, cost recovery was limited and there were many defaulters on payment for water use. When cost was an issue, a number of people continued to use their usual unprotected sources of water. Apart from health implications (e.g. risk of cholera outbreaks), the returns on investment for schemes where cost recovery applies could not be realised since people did not always use them. In urban areas, cost recovery has led to controversial cut-offs which directly impact on the right to water. Thus cost recovery can run counter to realising economic and social rights. Furthermore, the impacts of global policy prescriptions such as cost recovery and decentralisation have led to a marked lack of financial and institutional resources to realise rights. Thus while it may be possible to dance to the two tunes of rights and markets in some urban middle class areas and big cities, in poor regions, dual commitments to both rights and markets can fail to provide the intended outcome.

Finally, there is also the larger question of how rights are interpreted and deployed by local people. In urban areas, famous cases such as Grootboom (named after Irene Grootboom) have highlighted that poor people can be agents of change as they appeal to the Constitutional Court to advance their constitutional rights to basic services. In 2000, residents of Wallacedene, a large shantytown in the Cape Town area made legal history when the Constitutional Court ruled in favour of their housing rights. Today, four years on, the people behind the historic Wallacedene settlement are still waiting for proper housing facilities. In fact, as one commentator argues, the only concrete building that the residents have is a stinking ablution block with broken pipes and inadequate sanitation facilities (Schoonakev 2004). Since the Constitutional

Court failed to specify which manifestation of the state – whether national, provincial or local – should honour the rights of the residents, there is a lack of clarity on where the locus of responsibility lies with regard to the implementation of the Grootboom judgement. The Constitutional Court also did not play any role in supervising or overseeing the implementation of the various orders and the South Africa Human Rights Commission is only playing a monitoring role. Residents are angry because they now do not know whom to turn to. This highlights the difficulties around specifying duty bearers and their responsibilities in the case of implementing social and economic rights.

Still, overall people are asserting their right to water in South Africa, especially in the urban areas. Protests against disconnections are widespread. On 6 April 2002, 87 people were arrested in Johannesburg who were protesting against water and electricity cut-offs. This is due to the replacement of flat rate payments for services by metered bills. Professor Kidd of KwaZulu- Natal University examined how the courts have handled the issue of cut-offs in conjunction with the South African constitutions and the Water Service Act. He concludes that while water services can be disconnected if appropriate measures are followed, consumers who are cut off due to non-payments must have their supply restricted rather than discontinued completely (Kidd 2003).

In remote rural areas such as the Eastern Cape, the capacity of citizens to claim their constitutional rights to basic services is far lower than in the cities. Many people are not aware of their constitutional right to water. Therefore they are less likely to hold the government to account if their rights are violated. In part this is because of their ignorance of these rights, and in part it is because the mediators of justice (e.g. courts, lawyers, activists) are more likely to operate in metropolitan areas than in remote ones.

These problems should not detract from the fact that constitutional endorsements to social and economic rights are very important. In acknowledging the right to water, the South African government has gone against the grain of conventional wisdoms around both questions of rights and entitlements of citizens and donor debates around water provision. In this respect, the FBW is a remarkable achievement. Due to the Constitutional right to water, poor people have moved the courts to seek interim relief from disconnections with success.<sup>13</sup> However this paper has shown that in order to be more effective, the sins of omission such as poor institutional capacity and financial resources need to be overcome. There is also the need to pay attention to poverty and livelihood questions, problematic implementation of the policy, the lack of awareness and the variable levels of accountability mechanisms to provide redress.

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<sup>13</sup> For example, in Hillbrow, Johannesburg, the residents successfully managed the authorities to restore the water supply on a temporary basis (Community Law Centre 2002).



### **3 Seeking redress and struggles for accountability: violations of rights in India's Narmada Valley**

#### **3.1 Dam-based displacement in India**

In recent decades, post-independent India has witnessed the emergence of new social movements questioning conventional 'development' models and the role of the state in decision-making processes concerning access to and control over natural resources. Be they movements protesting against large dams, thermal plants or the patenting of indigenous seeds and plants, all of them have highlighted how the state and its international partners (e.g. the World Bank) have sanctioned and implemented development schemes that have been inimical to the livelihoods of the poor and marginalised in rural areas. Nowhere is this more evident than with large dams. While large dams might have made some parts of the desert bloom and led to full granaries and enhanced food security, they have not been without high social and environmental costs (cf. McCully 1996; Goldsmith and Hildyard 1992). For the people adversely affected by large dams, they have meant displacement and homelessness. The rivers, expected to be transformed by dams and reservoirs to harness power and water, have become rivers of sorrow for the displaced people living on their banks (Thukral 1992). Indeed, since independence, around 30–50 million Indians – mainly from *adivasi* (tribal)<sup>14</sup> and low caste communities – have lost their lands and livelihoods due to the forced displacement caused by the reservoir flooding of large dams (ibid; Roy 1999). Displacement and resettlement have been traumatic and protracted processes that have uprooted people from their familiar environment. Largely, the planning and implementation of resettlement and rehabilitation has varied from state to state and has proceeded on a very ad hoc and incremental basis (cf. Thukral 1992; Fernandes and Thukral 1989; Dreze *et al.* 1997). Little wonder, then, that many of the oustees of dams such as Ukai in Gujarat, Hirakud in Orissa and Bhakra Nangal in the Punjab have joined the ranks of urban slum dwellers, migrant workers or fallen into the cycle of debt bondage. Out of the millions displaced, only 25 per cent have been rehabilitated (Parasuraman 1997). The rest have undergone drastic changes in their economic, socio-cultural, and nutritional contexts, which have been well documented in various studies (e.g. Thukral 1992; Fernandes and Thukral 1989; Morse and Berger 1992).

#### **3.2 The Narmada Project**

The dams on the Narmada River also stand out with regards to their high social costs. They are also famous due to the activities of the *Narmada Bachao Andolan* (Save the Narmada Movement, henceforth *Andolan*). The *Andolan* has successfully highlighted and drawn home to millions all over the globe the plight of the displaced peoples affected by the Narmada dams and the dark sides of top-down projects such as large dams. It has also inspired several social and environmental struggles on the Indian sub-continent and raised questions important for India's future such as sustainable development, participation, the rights of indigenous peoples, the viability or non-viability of large top-down centralist projects and the

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<sup>14</sup> *Adivasis* literally mean 'original/ earliest settlers'. This term is used to designate the indigenous peoples of India, officially known as 'scheduled tribes', who make up about 7 per cent of the entire population.

mobilisation of protest. Over the years, the *Andolan* adopted a strategy of non-cooperation, mass mobilisation and non-violent forms of protest including rallies, picketing, sit-ins, fasts and the more extreme case of *jal samapan* (save or drown actions). By following the slogan, 'We will drown, but not move' activist villagers have refused to vacate their ancestral homes. As a result they have resisted and faced police atrocities and repressive tactics including mass arrests, harassment, the molesting of women and the clear felling of their forests (see Mehta 2000).

The Narmada Project comprises two mega-dams, 30 large dams, 135 medium dams and 300 small reservoirs and dams. All these projects, if realised, will most certainly totally transform the Narmada River, India's holy and last free-flowing river. One of the mega dams, the Sardar Sarovar Project (SSP) is supposed to bring water to some 30 million people and irrigate 1.8 million hectares of land with a capacity of 1450 megawatts of power (Raj 1991). The 163-metre dam, if completed, will submerge 37,000 hectares of forest and prime agricultural land. Apart from the various disputes about its purported benefits and environmental impacts, it has been criticised due to its deleterious human consequences. The project will negatively affect the homes, lands and livelihoods of about a million people. About 250,000 people will be directly impacted and lose their homes due to reservoir submergence in Gujarat, Maharashtra and Madhya Pradesh. The rest will be indirectly affected due to the effects of the canal construction and downstream impacts of the dam. In 1992, the report of an independent review set up by the World Bank, also known as the Morse Report, found that the World Bank and the government of India had violated the provisions of the Bank's resettlement, tribal peoples as well as environmental policies (Morse and Berger 1992). In 1993, the Government of India cancelled the remaining balance of the loan and the World Bank withdrew its funding from the project in 1993 due to national and international criticism. During most of the 1990s, work on the dam had stopped since the Indian Supreme Court had passed a stay order on the dam's construction for six years. In 2000 a controversial Supreme Court judgment allowed the dam's construction to go ahead.

### **3.3 Rights violations in the Narmada Valley**

Since 1991, every year during the monsoons (in particular during heavy rains) tribal villages have been partially submerged by the swollen waters of the Narmada River. A river known to them as Mother is converted to a death trap as the rising waters submerge crops and homes. Resettlement and rehabilitation must follow the procedures set by the following: the Narmada Water Disputes Tribunal Award (NWDT);<sup>15</sup> the directions of the Indian Supreme Court of 2001;<sup>16</sup> the rehabilitation and resettlement

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<sup>15</sup> The Narmada Water Disputes Tribunal (NWDT) was established in 1969 by the Indian government to settle conflicts over the Narmada river between states, concerning sharing the waters, rehabilitating displaced people, and the height of the dam, etc. The Tribunal laid down guidelines for the rehabilitation of the affected population in 1979 (Clark and Bhardwaj 2003).

<sup>16</sup> In October 2001, the Supreme Court of India issued directions in relation to the Sardar Sarovar Project, including the obligation to comply with the relief and rehabilitation work, and 'take the necessary ameliorative and compensatory measures for environmental protection' (Clark and Bhardwaj 2003: 9)

policies of the states of Gujarat, Madhya Pradesh and Maharashtra;<sup>17</sup> World Bank policies<sup>18</sup> as well as India's human rights obligations.<sup>19</sup> Further international human rights instruments relevant for dam-based displacement include:

- The 1986 General Assembly Declaration on the Right to Development endorses individuals' rights to participate and enjoy economic, social, cultural and political development to realise fundamental human freedoms. The Declaration also asserts the right of peoples to self-determination and their 'inalienable right to full sovereignty over all their natural wealth and resources. While, in principle it could also includes states' right to development according to Rajagopal's interpretation, the language makes it clear that 'local communities and individuals, not states, have the right to development' (Rajagopal 2000: 5)
- The Right to Life and Livelihood is founded in the UDHR (Article 3) and Articles 6 and 11 of the ICESCR (Robinson 2003: 14).
- The 1991 International Labour Organisation Convention concerning Indigenous and tribal peoples in Independent Countries (ILO 169) recognises that Indigenous and tribal peoples have a right to take part in the decision-making processes of the States in which they live.
- In November 2002, the United Nations Committee on Economic, Social and Cultural Rights adopted the General Comment on the right to water.<sup>20</sup>
- In 1998, the UN Representative on Internally displaced persons came up with Guiding Principles on Internal Displacement. Even though they are not a binding legal document, they are based on and consistent with international human rights law, humanitarian and refugee law. Principle 6 explicitly makes a reference to development-induced-displacement (Robinson 2003: 3).<sup>21</sup>

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<sup>17</sup> The rehabilitation and resettlement policies of the states of Madhya Pradesh, Maharashtra and Gujarat provide policies for land allocation as well as a rehabilitation grant or subsistence allowance, transport grants, as well as compensation for land and housing and civic amenities such as drinking water, electricity, a primary school, place of worship, etc. (NCA 2005).

<sup>18</sup> The World Bank's policies for Involuntary Resettlement and Indigenous Peoples, of December 2001 aim to 'address and mitigate' the risks of impoverishment. The policy maintains that involuntary resettlement should be avoided or where feasible or minimised. Where resettlement is not avoidable, it should take the form of sustainable development, with investment resources to enable displaced persons to share in the benefits of the project. Resettlement should be carried out in a participatory manner (World Bank 2001).

<sup>19</sup> India has signed on to various international human rights treaties which recognise, among others, the right to life, freedom of movement and to choose one's residence, and to an adequate standard of living, including adequate food, clothing and housing. The Covenant on Economic, Social, and Cultural Rights requires, for instance, that procedural guarantees be offered by the government, including 'genuine consultation with the project-affected people, the issue of adequate notice to all affected persons prior to the date of eviction, and the provision of legal remedies and legal aid where applicable' (Cullet 2000: 2 of 5)

<sup>20</sup> The Committee stressed the state's legal responsibility in fulfilling the right and defined water as a social and cultural good and not solely an economic commodity.

<sup>21</sup> The Guiding Principles are key because they go beyond 'refugee-like criteria to include those displaced by 'natural or human-made disasters'. Principle 6 states clearly: 'Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence;' this prohibition against arbitrary displacement 'includes displacement in cases of large-scale development projects which are not justified by compelling and overriding public interests' (Robinson 2003: 3).

The World Bank policies were in force when the 1985 loan was approved to the Sardar Sarovar. According to legal specialists, they continue to apply to the project and will continue to apply until the loan is repaid. The most relevant policy includes the Involuntary Resettlement Policy (OM S233, Issued February 1980) which clearly states that settlers' living standards need to at least match those before resettlement and that the Bank will avoid or minimise involuntary resettlement wherever feasible (Clark and Bhardwaj 2003: 7). Furthermore, the tribal people's policy (OM S 234, Issued 1982) clearly states that wherever tribal people are involved, projects must be designed to safeguard the special interests and well being of tribals.<sup>22</sup> Even though the World Bank is no longer involved in the project, according to advocacy groups the World Bank should not be absolved of its responsibility for ensuring that the project continues in compliance with its policies and safeguards. The World Bank's General Counsel also clarified that the government of India is legally obligated towards the Bank to carry out its obligations under the loan agreement (Clark 2003). Similarly, this should not absolve the Central government and the three states to comply with internationally and nationally recognised standards around resettlement and rehabilitation. But the Bank has failed to exercise its supervision and monitoring obligations. There is a complete lack of public accountability on the part of the World Bank. This is particularly problematic for projects involving displacement, since relocation usually takes place many years after the loan is disbursed. Thus local people have no official recourse for redress of violations.

This is paradoxical since it was the protest in the Narmada Valley that led to the constitution of the first ever World Bank Independent review and also of the Inspection Panel and the convening of the World Commission on Dams. Thus, while the protest movement has had significant victories with respect to the creation of new policies and institutions, their lot on the ground has not improved significantly. Largely, there has not been compliance of the basic principle of the NWDT Award which stipulates that displaced people must be resettled at least one year before submergence and that they should be completely rehabilitated in their new homes six months before submergence. Moreover, increases in the dam's height have not proceeded hand in hand with rehabilitation (Clark 2003). In 1993, I witnessed how villagers in Vagdham (Gujarat) and Manibeli (Maharashtra) lost most of their belongings, houses and lands to the rising waters and many of them still have not been rehabilitated. In 2001, a fact-finding mission found that a large number of people affected at 90 m had not been rehabilitated (Clark and Bhardwaj 2003). In 2002, floodwaters during the monsoon of September submerged homes, crops, and livestock across the Narmada Valley. People had to be pulled out of hip-high water by the police. People stood in rising waters in their homes and the police arrived to arrest them. A young *adivasi* woman from Madhya Pradesh told a gathering that I attended in Delhi in 2002:

A few months ago, a team surveyed the whole village, the lands, the assets and the resettlement package. The team assured us that they would not allow any submergence to take place until the

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<sup>22</sup> It is well known that indigenous peoples all over the world are struggling to have recognition of the 'right to have rights' as citizens and human beings (ICHRP 2004: 19). Struggles like Narmada also highlight the struggle around what constitutes 'indigenous.'

resettlement process was completed. But still on the day when the water came, 5000 police personnel came to the village with only four women police. We asked why so many police had come ... All of a sudden they began dragging us out of our houses. They even dragged out the women who had no clothes with them. They pulled children and even a 3-month-old baby who could barely survive without its mother. There was another four-year-old child who was found only after 15 days. On the one hand, our village was filling with water and on the other hand the police were dumping people forcibly in makeshift camps.'

Every year when submergence occurs, there are problems with the availability of food supply and access to drinking water due to the destruction of crops and the complete transformation of the river (Clark and Bhardwaj 2003). Furthermore, the Indian government is also known to resort to draconian measures to make protest illegal and thus legitimise mass arrests which can severely impinge on displaced people's civil and political rights and also contravene Article 19 of the Indian Constitution which allows people to protest peacefully.

In Madhya Pradesh, interviews with oustees and activists revealed that there is a marked lack of available land and the authorities often entice oustees to accept cash compensation instead of providing them with land. This is a clear violation of the land-for-land policy which constitutes best practice both in India and internationally. There is also a lack of information about displacement and rehabilitation everywhere and displaced people experience a great deal of uncertainty. It is not uncommon to hear graphic stories about not being told about the dam, when and who would be submerged, what the entitlements are, thus violating oustees' right to information and participation.

But even people rehabilitated over a decade ago and living in the 200 resettlement sites scattered across Gujarat are unhappy and lack access to basic rights. Many of the resettlement sites have poor agricultural land, lack water and basic amenities. One such place is Malu, a resettlement site in Gujarat, India. The residents of Malu were moved there about 12 years ago after being displaced from their homes along the banks of the Narmada River to make way for the construction of the Sardar Sarovar Project. One of the biggest sources of illness for the people of Malu is the poor water quality. The changes of access to water for the displaced people in Gujarat has led to a decline in their sense of well-being because the once taken for granted freedoms around water – central to their life – have been taken away. A free flowing river, which gave them 24-hour access, has been replaced by various unreliable sources that provide water for very short periods. Displaced people have little control over the operation or maintenance of these taps or indeed the quantity of water available daily. Even though there are several standpoints and taps around the site, the water supply is not as reliable. The autonomy that women enjoyed in collecting water whenever they wanted has been lost. Instead, they are dependent on the government, host villagers and other people for their daily supply. Moreover, the quality of the water is also highly problematic; illnesses such as diarrhoea, vomiting and other water-borne diseases are quite rampant in the resettlement village (Mehta and Punja, forthcoming). My research in 2000 showed that the poor quality of water has also led to an increase in mortality. Many households in Malu have lost family

members in the village, especially children. The number of children dying in the 0–1 year age group was double that of the host village. In the 1–5 year age group, it was nearly six times higher in 2000. The family that looked after me while I stayed there lost two children, their son from septicaemia in August 2000 and in November, their granddaughter died at nine months. In addition, everybody, including adults, spoke of reduced immunity and weakness. The mixing of different water sources everyday and the lack of forest vegetables and herbs also seemed to contribute to their frailty.

### **3.4 Accountability issues**

Who is accountable to these displaced people and to whom can they turn to for redress? Let me focus on the difficulties of holding both the State and World Bank accountable. For oustees who have experienced human rights violations, the first port of call has been the relevant resettlement agency in one of the three states of Maharashtra, Gujarat and Madhya Pradesh and the bureaucracies concerned (for example, those overseeing resettlement, forest, rural development issues). Largely, however, these various organs are full of biases that make it difficult for oustees to seek redress or claim accountability without the help of mediators such as activists or voluntary organisations. For example, oustees need to endure several bureaucratic procedures (such as endless form filling/ meetings) that can be very intimidating for groups, especially tribals who are not familiar with the written word. In response to the growing complaints by oustees, the Supreme Court in 1999 mandated the setting up of a Grievance Redressal Authority (GRA) for Gujarat, and in 2000 for Madhya Pradesh and Maharashtra, to look into the rehabilitation-related grievances of the project-affected people. Each of these GRAs is headed by a retired Supreme Court or High Court judge. The Rehabilitation and Resettlement Sub-Group of the Narmada Control Authority is required by the Supreme Court to consult the GRAs before giving a clearance that rehabilitation at a particular height is complete (Clark and Bhardwaj 2003). In some cases, this has helped and some oustees have indeed been able to have their problems addressed and even had their land changed. But the grievance redressal procedure can also be rather partisan and displays elite biases. GRA officials often do not visit the affected areas, are not attentive during meetings and the filing of complaints and the endless rounds of meetings can add a new layer of bureaucracy for the displaced.

Sit-ins, protest and hunger strikes in state capitals and in Delhi have led to Ministers and senior bureaucrats, members of the National Human Rights Commission and National Women's Commission making visits to the affected areas and to resettlement villages. In an incremental way, the lot of some oustees has improved as a result of these massive protests. For example, land has been re-allocated and basic services have been provided. Still, despite mass mobilisation, high profile campaigns and media presence, rights continue to be violated with impunity in the Narmada Valley. Moreover, the Narmada Control Authority (NCA) has often agreed to increases in the dam's height despite illegalities and failures related to Resettlement and Rehabilitation (R and R). The state governments claim that they have already provided R and R and that the affected people should address their concerns to the GRA. The Central government often passes the buck to the relevant state governments.

Due to these institutional and accountability failures there are now calls to re-focus attention on the World Bank. While most displaced people do not want the World Bank to be involved, they continue to hold it responsible for its role in promoting a project that so clearly violates its own policies as well as international human rights standards. Dana Clark of the International Accountability Project therefore suggests that the Bank enforce terms of the loan conditions since it has ongoing relationships with both the Indian government as well as with the three states through ongoing irrigation and power sector loads. Moreover, the Board of Executive Directors who sanctioned the project needs to have a 'fiduciary' responsibility to take action and uphold the integrity of the project and address the accountability gaps and implementation failures. According to the Centre on Housing Rights and Eviction (COHRE) both the IADB and the World Bank are obliged to provide reparations to survivors and their families due to both the massacre and the desperate inadequate living conditions after resettlement.

But how can such mechanisms be installed? At the moment, International Financial Institutions (IFIs) such as the World Bank disclaim all responsibility and claim that it is up to the borrowers to fulfil loan agreements. Still, as economist Kunibert Raffer argues, there is a need for reforms to make the IFIs financially accountable (Bretton Woods Project 2004). At the moment, there is a 'perverse incentive structure' which calls for new loans to make good on badly implemented projects and adjustment schemes which end up benefiting the IFIs. Instead, it has been suggested that an international court of arbitration could decide on how the IFI and borrower countries could share costs in the case of disagreements after complaints are filed by governments, NGOs and the affected people (Bretton Woods Project 2004).

#### **4 Key lessons from the case studies**

What lessons emerge from the case studies regarding implementing and realising rights and the role of accountability? Case one largely focussed on sins of omission whereby, despite the existence of a constitutional right to water and related policies, millions in South Africa were either not aware or not given access to these rights. Thus, a right conceived at the national level was still to be realised on the ground in many parts of the country. In some areas, the right to water was also hindered by market processes such as cost recovery leading to controversial cut-offs. Case two examined sins of commission and demonstrated how despite a range of international and national standards as well as human rights instruments, rights were being violated with impunity by both the Indian government and the World Bank. It would however be misleading to make a sharp distinction between sins of omission and commission. The South African government, by allowing liberalisation and market-driven approaches in the water sector that can impinge on people's basic rights, is also guilty of sins of commission. Similarly, the Indian government and the World Bank, by not providing appropriate institutional structures, commit sins of omission despite professing to uphold the rights of displaced people. To recap, it is worth examining some of the questions raised earlier in the paper: why and how are economic and social rights compromised despite the best intentions? What are the contradictions that continue to exist regarding

duty bearers, protectors and violators of rights? Why do rights continue to be violated with impunity in the case of forced displacement? I now attempt to answer these questions by teasing out key lessons emerging from both these cases.

#### **4.1 Institutional mechanisms and accountability structures**

Largely the law, both national and international, is a solid basis for holding governments accountable for protecting human rights for all and for promoting national legislative, policy and other initiatives which comply fully with the international standards that governments themselves have accepted. Both South Africa and India have the necessary legislation in place and have rights-based elements in their constitutions. Both countries have human rights commissions that monitor how rights are being violated or realised. In both cases, the human rights commissions have taken pro-poor stances. But the institutional arrangements for adequate follow up may sometimes be limited. This is particularly true for Narmada where the monitoring of human rights violations has not necessarily led to a change in the perception that officials can continue to disregard human rights in order to carry on with dam-building activities. As the International Council on Human Rights Policy (ICHRP) rightly says ‘while national human rights commissions can promote and validate a human rights culture in the right circumstances, they can equally remain ineffectual when they operate in a political culture that ignores or is antagonistic to human rights.’ (ICHRP 2004: 42).

Largely, judicial activism has enhanced the voice of the poor and played a very constructive role (Goetz and Jenkins 2004). Indeed, Grootboom in South Africa has demonstrated how judges’ constitutional interpretation can expand the scope of rights and thus increase the state’s obligations to citizens. But even in Grootboom, despite a landmark constitutional judgment, the residents still lack dwellings and water and sanitation facilities that allow them to live in dignity and it is alleged that the key activist, Irene Grootboom, has vanished. In India, too, much is made of judicial activism and the role of Supreme Court in enhancing voice. But the Narmada judgement changed this perception. The controversial 2000 Supreme Court judgement is considered by many to be a highly emotive and non-judicial judgement, making many in India now cautious of following the public interest litigation route. Thus the law turned out to be highly arbitrary, influenced by powerful vested interests and narratives and thus cannot always be relied upon to be a panacea for ongoing injustices.<sup>23</sup>

Finally, even accountability institutions that are in place may display variable outcomes. Indeed, as Niraja Gopal Jayal argues, ostensibly pro-poor institutions can work towards enhancing the interests of the more privileged sections of society (Jayal 1999). Thus even watchdog institutions such as the GRA can display elite biases and are less sensitive to exclusions due to lack of education or information. Moreover, ‘accountability to less powerful members is rarely a part of the implicit contracts or compacts underlying uneven power relations’ in such institutions (Goetz and Jenkins 2004: 41). Thus bureaucrats may not see it

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<sup>23</sup> Even the ICHRP notes that when indigenous peoples use the Supreme Court the outcomes can be variable. For example, Oaxaca Indians found that the Mexican Supreme Court refused to accept their evidence (ICHRP 2004: 22).



in their remit to be partisan to issues concerning social justice, equity and human rights. Moreover, institutionalised biases often exist in the interest of the rich since the ability to seek redress hinges on the ability to communicate in dominant languages, interact with lawyers, or have massive endurance. Thus efforts to institutionalise rights and seek accountability can be thwarted by systematic malfunctions in key accountability mechanisms. This need not be just due to elite capture but also due to systematic bias against the poor (ibid.).

In the case of Narmada, despite many victories and the establishment of several new institutional processes that should enhance the rights of displaced people around the world (e.g. the Inspection Panel, World Commission on Dams, GRAs), human rights continue to be violated with impunity in India. The World Bank also has no mechanisms to ensure that borrowers comply with loan regulations and standards and tends to pass the buck to borrower countries. While human rights commentators such as the ICHRP (2004) talk of creating a favourable institutional environment in which to realise human rights and seek accountability, often the institutional mechanisms in place may not end up being very pro-poor in their outcomes. Furthermore, access to economic and social rights are hindered due to the ignorance of internationally recognised rights and the lack of legal training among officials working with marginalised groups.

#### **4.2 Duty bearers, protectors and violators**

The two cases highlight problems around apportioning blame for rights violations and identifying who bears obligations and responsibilities to realise rights. This is particularly true in the contemporary world characterised by processes of economic globalisation which has led to the proliferation of demands for new ways of making powerful actors, within and beyond the state, accountable for the impact of their actions on poor people (Goetz and Jenkins 2004: 28). With respect to the right to water, States are clearly responsible for ensuring the progressive realisation of the right to water which is laid out in the General Comment (COHRE 2004). Thus the formulation of FBW and the measures in place to implement FBW in South Africa are steps forward in this regard. Still the case study demonstrated massive problems in implementation, some of which were due to decentralisation processes through which local authorities have assumed many responsibilities but have had few resources (both financial and institutional) to implement the right to water.

Moreover, with the inclusion of new private actors, states are not merely enforcers of rights, but increasingly act as ‘regulators’ and facilitators of rights (INTRAC 2003). Unfortunately, the General Comment and other such instruments do not explicitly mention private actors as accountable and responsible. Ironically too, rights are denied at the ‘behest of powers beyond the state itself’ (INTRAC 2003: 3). For example, IMF and World Bank policies oblige states to curtail basic services and impose charges that exclude large numbers of vulnerable people, thus helping to perpetuate sins of commission. But it is unthinkable that the World Bank or the IMF could be directly held accountable for the violation of access to basic services in poor countries. Thus, economic globalisation has also led to the state assuming a schizophrenic role. This poses a dilemma for agents of change such as social movements. For

many it is unclear how best to ‘engage with the state, which is both adversary and ally’ (ICHRP 2004: 61). For example, governments are best placed to provide economic and social rights protection through equitable budget allocations. Similarly, only the state and communities can ensure that economic actors properly regulate the behaviour of markets and operate in a fair and transparent manner and provide adequate social protection to those who suffer insecurity and a loss of rights. Still governments can enforce policies and programmes such as privatisation and structural adjustment that can erode people’s rights. While provisions exist for protection, for example, under the *Water Service Act* no disconnections can take place due to inability to pay, the onus of proving ability lies with the water user and will depend on the user’s ability to access legal advice and representation, which is definitely minimal in many communities (COHRE 2004: 54). Thus, links between ordinary citizens and their representatives in South Africa have become muffled through policy shifts towards GEAR and ‘fairly orthodox forms of neoliberal economic globalisation’ due to behind-the-border convergence and consensus between multilateral institutions, governments, and firms (Goetz and Jenkins 2004: 25).

As Donnelly (1999: 628) says, ‘markets are social institutions designed to produce efficiency’. At times, though, markets may compromise social and economic rights since they ‘can systematically deprive some individuals in order to achieve the collective benefits of efficiency’ (ibid.). The impacts of structural adjustment programs are a good example of how the social and economic rights of poor people have suffered as a result of market-led growth strategies. While structural adjustment may have led to increased efficiency, they have had high social costs (Social Watch 2003). Similarly, regulation that merely focuses on efficiency and growth may not necessarily be committed to ensuring access to basic services or protecting access to services that prior to privatisation had reached out to the poorest (Cook and Minogue 2003).

Similar contradictions exist with respect to dam-based displacement. Competing rights claims exist due to a lack of clarity around who has rights, whose rights are at risk and who is to be the duty-bearer to protect and fulfil the different rights. Take oustee displacement. The fact that it is legitimised through the overarching principles of ‘development’ and ‘national purpose’ has often made it traditionally difficult to contest the corrosion of basic rights. This is because oustees’ rights are pitted against the so-called rights of the larger population expected to benefit from the planned highway, road, park or dam. Increasingly, however, it is now acknowledged that such social development processes have been skewed in terms of how gains and pains are spread. Often a small and elite minority has benefited immensely, while a large silent group has borne disproportionate costs. Their concerns, rights and needs are however rarely captured in conventional cost-benefit analyses that tilt in favour of the interests of the rich and powerful. Such cost-benefit analyses are also silent about the hidden costs of such schemes (e.g. a total disregard of non-monetised resources and exchanges, downstream impacts of dams, and so on). As W. Cortland Robinson argues ‘Development is a right but it also carries risks to human life, livelihood, and dignity that must be avoided if it is to deserve the name’ (Robinson 2003: 59).<sup>24</sup> Still, State governments may often be willing to violate civil and political rights when they evoke the principle of ‘eminent domain’. Thus oustee

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<sup>24</sup> See also Arundhati Roy’s evocative essay on the ‘Greater Common Good’ (1999).

attempts to seek redress can be tricky since the state is often both the perpetrator of human rights violations and the arbiter of justice. The Indian state also does not recognise several international rights regimes.<sup>25</sup> While India has ratified the original ILO Convention 107, expert committees have constantly urged the Indian government to take ‘urgent measures to bring its resettlement and rehabilitation policies in line with the Convention’ (cited in Cullet 2000: 3 of 5).

### **4.3 The politics of citizenship**

One reason why rights often do not make much of a difference to poor people is due to wider political factors and also a marked lack of political will on the part of powerful stakeholders to be partisan to the needs and interests of vulnerable citizens. As mentioned earlier, there is a tremendous reluctance on the part of global water players to endorse the human right to water. The South African case highlights problems that arise when adequate financial resources are not provided to realise rights to water and through contradictions arising from market-based approaches. However, promoting the human right to water can only be the result of a conscious socio-political choice on the part of decision-makers and local people. Financial allocations to basic services such as water are also part of such choices. The lack of financial resources is clearly a problem yet it is well known that the allocation of resources to prestigious projects and arms purchases often take place at the cost of neglecting social concerns coupled with unfavourable and anti-poor economic policies promoted by IFIs. For example, a mere 1 per cent off military budgets would easily match the additional US\$9–15 billion estimated by the Water Supply and Sanitation Collaborative Council (WSSCC) for achieving the MDGs on water and sanitation through low cost technology and locally appropriate solutions. It is a lot of money but one cruise missile deployed in Iraq costs US\$2.5 million and this is what the US government spends on defence every 10–15 days (see Mehta 2004 for more details).

Also in the case of oustee displacement, there is a marked lack of official endorsement to shift from policies and programmes that focus on impacts and risks of displacement to upholding the rights of the displaced. For example, the World Bank, despite being one of the founding members of the World Commission on Dams (WCD), declined to adopt the rules of the WCD as the guiding principles of its operations. The WCD recommended, amongst other things, a decision making process that should strive towards balancing the rights and risks of all stakeholders, and in particular, protect the rights of groups such as indigenous peoples. But it is unlikely that states and institutions executing relocation and resettlement programmes will relinquish power to hitherto marginalised groups to make them respected equals in the process. Moreover, as Clark has demonstrated, the World Bank’s revised resettlement policy of 2001 waters down some of the strengths of its 1980 policy which clearly states that displaced people should benefit from the project and should have their original standard of living improved or at least restored (Clark, forthcoming). For example, the revised policy no longer applies to those affected by the

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<sup>25</sup> Such as the updated 1989 107 ILO Convention which provides stronger rights to indigenous peoples (Cullet 2000).

‘indirect’ impacts of a project (e.g. downstream impacts of a reservoir). Similarly the focus on the restoration of past incomes is a step back from embracing development-oriented objectives of improving life styles and livelihoods of project affected people (see criticisms by Scudder 1996; Clark forthcoming). It may also seriously disadvantage indigenous peoples, women and ethnic minorities who often lack formal legal rights to land, but whose rights are enshrined in customary arrangements. To underscore these measures are a step back from the previous provisions that provided compensation mechanisms to those without formal titles to the land. In sum, ‘access to the rights to those at the bottom of the pile can only be achieved by radical policy changes backed up with financial support’ (ICHRP 2004: 39). To do this strong commitments towards furthering the interests of the weak and marginalised are urgently required.

## 5 Conclusion

This paper has examined why citizens are denied economic and social rights through sins of omission and commission. Sins of omission take place due to the lack of financial resources, poor institutional capacity, poor awareness of rights and the lack of means to seek legal recourse. Sins of commission, by contrast, take place when rights are knowingly put at risk due to the lack of commitment to the citizenship rights of marginalised people, clear anti-poor and elite biases in institutions and significant accountability gaps at all levels to provide redress for rights violations. While the South African case largely focussed on the former and the India case addressed the latter, in both cases there is a blurriness between policy and practice around rights practice and violation and at times there are overlaps between sins of omission and commission.

This makes me return to the title of this paper: Do human rights make a difference to marginalised and vulnerable people? And are rights ‘rights’ if nobody bothers to uphold them? Clearly, not having access to rights does not mean that the rights do not exist. Instead, it means people cannot enjoy their rights due to various obstacles such as those outlined in this paper and due to the lack of adequate protection in cases of gross violations.

This should not detract from the fact that rights do and should matter. The success of high-profile resistance activities such as those on the Narmada dams depends on transnational alliances of NGOs, campaigns and movements. Here international human rights standards as well as the policy directives of international organisation such as the International Labour Organisation (ILO)<sup>26</sup> and the World Bank are evoked and adapted to grant salience to local struggles and campaigns. These informal mechanisms of claiming rights and seeking accountability have been powerful agents of change. While success has often been more symbolic rather than material, they have often invariably transformed public and political attitudes as well as unleashed debates around social justice.

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<sup>26</sup> For example, ILO 107 and later ILO 169 which specifically deal with the rights of indigenous peoples.

Similarly, the right to water is internationally recognised by both developing and industrialised countries as defined in General Comment 15. It includes clearly defined and realisable obligations, and thus forms the basis of concrete negotiations between the state, the communities concerned and civil society advocates. Moreover, the right to water in principle provides justiciable components to local claims and struggles around water and can also be used as a countervailing force against the commodification of water which can impinge on poor people's rights. That few people in South Africa or around the world are demanding compliance and answerability around the right to water is another matter. But local struggles to realise the right to water are on the rise and the demands for accountability from water providers and those responsible for protecting this right, will also therefore increase. In order for human rights to really make a difference, we can only hope that more attention will be paid to accountability mechanisms through which compliance and answerability become an indispensable aspect of the human rights regime.

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